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No. 10-741

IN THE
Supreme Court of the United States

RANDY RICHARDSON,

Petitioner,

v.

THOMAS CARL DODDS, JR.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the Tenth Circuit correct in concluding that Sheriff Richardson could be liable under § 1983 for depriving Thomas Dodds of his constitutional rights, where the court of appeals determined that Dodds had presented facts that established "personal involvement" by Richardson in the constitutional violation?

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INTRODUCTION

Petitioner asks the Court to grant the petition to review whether a supervisor may be held liable under 42 U.S.C. § 1983 for his "mere acquiescence" in a policy. Pet. i, 6. The court below, however, did not base its decision on Sheriff Richardson's "acquiescence" in the policy that deprived respondent Thomas Dodds, Jr. of his constitutional rights. It determined that Richardson had "personal involvement" in the constitutional violation. Pet. App. 36a. Accordingly, as the court below explained, whatever uncertainty exists about the contours of supervisory liability after *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009), does "not need to [be] address[ed] to resolve this case." *Id.* 28a. "Regardless of the fate of other theories of supervisory liability in *Iqbal*'s wake,. . . the facts presented on summary judgment taken in the light most favorable to Plaintiff establish Defendant violated his federally protected rights." *Id.* 33a. The decision below is consistent with *Iqbal*, there is no relevant circuit split, and the petition for certiorari should be denied

STATEMENT OF THE CASE

On April 6, 2007, Logan County, Oklahoma sheriff deputies arrested Thomas Carl Dodds, Jr. and brought him to the Logan County jail. The arrest warrant contained a pre-set bond in the amount of $5,000. Pet. App. 2a. When family and friends attempted to post bail for Dodds, however, jail officials told them that he could not be released on bail until after he was arraigned. *Id.* 3a. Dodds was not arraigned until April 9, at which point the bail was increased to $10,000. On April 11, Dodds was released on a personal recognizance bond. The charges against him were eventually all dismissed. *Id.*

Dodds filed suit under 42 U.S.C. § 1983 against Logan County Sheriff Randy Richardson, among others, for unconstitutional denial of bail. Dodds explained that he had a liberty interest in the pre-set bond that he was denied. *Id.* Richardson moved for summary judgment, arguing that he could not be held liable because he did not participate in Dodds' denial of bail, that a county clerk's office policy prohibited his office from accepting bond after hours, and that he was entitled to absolute or qualified immunity. *Id.* 59a-60a. The district court denied Richardson's motion, explaining that, "under Oklahoma law, a sheriff is required to accept bail which has already been set for persons jailed at times other than normal working hours." *Id.* 62a.

The Tenth Circuit affirmed. Explaining that "[t]he right of an accused to freedom pending trial is inherent in the concept of a liberty interest," *id.* 9a (citation omitted), and therefore that "the denial of bail must comport with the requirements of due process," *id.*, the court concluded that Dodds stated a violation of his constitutional rights. *Id.* 12a. It then turned to whether Sheriff Richardson could be held liable for the violation.

The court explained that it had long held that a plaintiff could not hold a government official liable under § 1983 on a theory of *respondeat superior*. The plaintiff had to establish an "affirmative link" between the supervisor and the violation. *Id.* 15a-19a. The court then discussed at length this Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), which held that government officials cannot be held liable in § 1983 suits "for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*," and that "a plaintiff must plead that each

Government-official defendant, through the official's own individual actions, has violated the Constitution." Pet. App. 21a-22a (quoting *Iqbal*, 129 S. Ct. at 1948). The Tenth Circuit noted that there was no consensus about the exact meaning of *Iqbal*, *id.* at 23a, and that it "may very well have abrogated § 1983 supervisory liability as [the Tenth Circuit] previously understood it." *Id.* 28a. The court determined, however, that if *Iqbal* did so, it was "in ways we do not need to address to resolve this case." *Id.*

"Whatever else can be said about *Iqbal*," the Tenth Circuit explained, "we conclude the following basis of § 1983 survived it and ultimately resolves this case: § 1983 allows a plaintiff to impose liability upon a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy" the enforcement of which causes the plaintiff to be deprived of constitutional rights. *Id.* 25a. The court explained that denying qualified immunity based on such a showing "complies with *Iqbal*'s requirement that § 1983 liability only be imposed upon those defendants whose own individual actions cause a constitutional deprivation because it requires plaintiffs prove each defendant took some act with the constitutionally applicable state of mind that caused the alleged constitutional violation." *Id.* 27a-28a.

Turning to the facts of this case, the Tenth Circuit determined that Dodds "presented facts that establish personal involvement by Defendant in the alleged constitutional violation." *Id.* 36a. The court disagreed with Richardson's characterization of his role as mere failure to act, noting that he was the final policy-maker for the jail and that Oklahoma state law charged him "with the

responsibilities of running the county jail and accepting bail." *Id.* 34a. The court concluded that the facts "show Defendant may have played more than a passive role in the alleged constitutional violation—he may have deliberately enforced or actively maintained the policies in question at the jail." *Id.*

Judge Tymkovich concurred, writing separately to discuss supervisory liability after *Iqbal*. *Id.* 46a. He concluded that "for purposes of this case, Dodds alleges the sheriff deliberately implemented an unconstitutional bail policy" and these "allegations are enough to survive summary judgment." *Id.* 57a-58a.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present the Question Whether a Supervisor Can Be Held Liable Under § 1983 for "Acquiescing" in a Policy.

Petitioner's primary argument for granting the petition is that the Tenth Circuit's decision "clearly conflicts" with *Iqbal* by holding that Richardson can be held liable for his "acquiescence" in his subordinates' actions. Pet. 10. The court of appeals, however, did not so hold.

In *Iqbal*, the Court considered whether a Muslim Pakistan citizen who had been arrested and detained following September 11, 2001, had pleaded facts that stated a claim for unconstitutional discrimination against former Attorney General John Ashcroft and FBI Director Robert Mueller. In discussing the elements a plaintiff must plead to state a claim of unconstitutional discrimination against government officials, the Court explained that "government officials may not be held liable for the

unconstitutional conduct of their subordinates under a theory of *respondeat superior*." 129 S.Ct. at 1948. Rather, "a plaintiff must plead that each Government-official defendant, through the official's own actions, has violated the Constitution." *Id.*

Relying heavily on *Iqbal*, the Tenth Circuit below explained that supervisory liability cannot be imposed based on a theory of *respondeat superior*. Rather, "*Iqbal[]* require[s] that § 1983 liability only be imposed upon those defendants whose own individual actions cause a constitutional deprivation." Pet. App. 27a. The court of appeals recognized that because of this requirement, *Iqbal* might have abrogated parts of the Tenth Circuit's previous test for supervisory liability, under which knowledge of and acquiescence in a constitutional violation could suffice to impose liability on a supervisor. *Id.* 28a, 16a. However, it concluded that liability could still be imposed on supervisors who had themselves caused a constitutional deprivation by promulgating, creating, implementing, or otherwise possessing responsibility for a policy that caused the complained-of constitutional harm. *Id.* 25a. The court determined that this basis of liability resolved the case. *Id.*

In other words, the court of appeals did not address whether acquiescence in an unconstitutional policy is sufficient to impose liability on a supervisor because it concluded that Richardson's own actions had caused the constitutional deprivation. Accordingly, this case does not present the occasion to question whether a government official supervisor can be held liable under § 1983 for his knowledge of and acquiescence in a policy that causes constitutional harm.

Petitioner nonetheless asserts that the "Tenth Circuit concluded former Sheriff Richardson could be held liable in his individual capacity for his acquiescence." Pet. 10. Petitioner's source of disagreement is apparently with the court's conclusion that Richardson did *not* merely acquiesce in the constitutional violation. The court of appeals correctly determined, however, that "[t]he facts, taken in the light most favorable to Plaintiff, show Defendant may have played more than a passive role in the alleged constitutional violation." Pet. App. 35a-36a. Indeed, the facts show that Richardson "may have deliberately enforced or actively maintained the policies in question at the jail." *Id.* 36a. In particular, as the court explained, "Oklahoma law charged Defendant as sheriff with the responsibilities of running the county jail and accepting bail from all arrestees not charged with death-penalty eligible crimes." *Id.* 34a; *see* Okla. Stat. tit. 57, § 47 (providing that the sheriff "shall have charge of the county jail of his county and of all persons by law confined therein" and is "required to conform, in all respects, to the rules and directions promulgated" under a code section on standards for jails); Okla. Stat. tit. 22, § 1101 (requiring that bail "be admitted upon all arrests in criminal cases where the offense is not punishable by death"). Under Oklahoma law, "a sheriff is required to accept bail . . . for those persons jailed at times other than the normal working hours of the Courts[,] provided proper bail has been set as provided by law." Okla. Att'y Gen. No. 69-138 (1969).

In short, Richardson did not just "acquiesc[e] in his subordinates' compliance with the then-existing policy set by others in the county." Pet. 17. As the court of appeals

correctly concluded, he was responsible for the policy. *See* Pet. App. 35a. In any event, petitioner's disagreement with the court's fact-based determination that Richardson may have deliberately enforced or actively maintained the policies in question, which was based on the specifics of how jail responsibilities are distributed under Oklahoma law, is unworthy of this Court's review.

II. Petitioner Has Shown No Circuit Split.

Petitioner also claims that review is warranted because "the Circuits interpret and apply the *Iqbal* opinion differently from each other." Pet. 14. But Petitioner does not demonstrate that any differences in the tests used by different circuits for holding government officials liable under § 1983 would affect the outcome of this case. Indeed, the result of this case should be the same under the tests used in all of the cases from other circuits discussed by Petitioner. *See* Pet. 14-16 (citing *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49 (1st Cir. 2009); *al-Kidd v. Ashcroft*, 580 F.3d 949, 965 (9th Cir. 2009), *cert. granted on unrelated questions*, 131 S. Ct. 415 (2010); and *Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2010)).

Instead of arguing that there is a disagreement between the decision below and the decisions of other circuits that is relevant to the outcome of this case, Petitioner contends that there is a general divergence among the circuits that shows that "the majority opinion in *Iqbal* is unclear." Pet. 14. The cases cited by Petitioner from other circuits, which deal with varying constitutional provisions and factual situations, do not demonstrate a meaningful disagreement about the application of *Iqbal* among those circuits. Even if they did, however, this

Court should not grant the petition to address any lack of clarity not implicated by this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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